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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No .....

PHILLIP BURROUGHS, CARLO CANTANIA, WARREN BURNS, JOHN POPOFF, HOWARD BALDWIN, LEO BARNES, LeROY McCOY, RONALD YBARRA, ORLANDO SENA, HARRY HANSON, DAVID BARBOSA, GILBERT ESCARCEGA, ANDREW BALANDIS, EDWARD HERNANDEZ, EZEKIEL PEREZ, CRUZ A. VALDEZ, WILLIAM CORTEZ, LOUIS CISNEROS, JR., DENNIS W. SMITH, LYLE BROWN, LOUIS CISNEROS, SR., AL SILVA, JOHN GREGORIO, WAYNE VAN KIRK, MANUEL A. LONGORIA, EDGAR C. DODD, JR., J. F. LULL, HECTOR CARREON, LEONARD SANTOS, RAYMOND CARILLO, JESUS E. SANCHEZ, ED JENSEN, MANUEL BELMONTES, RONALD HESTER, MICHAEL TICKENOFF, JACK LINDSAY, JAMES PARRINI, WESLEY BURTON, ROBERT WAKEFIELD, RALPH DESPER, CHARLES REBOLLEDO, RICHARD ALVAREZ, BILLY L. COOKE, RONALD EUGENE HARRUFF, CLINTON MOORE, RICHARD WEILAND, HUERTA PANTALEON, CHARLES TUCKER, TONY MOSQUEDA, WALTER M. TARNOFSKY, ROBERT A. McGRANAHAN, HENRY R. SZYMANSKI, ALBERT S. LOPEZ, MAURICE RICHARDS, ROSS C. LAGANA, ALLAN JACKSON, FELIPE GUERRERO, DANIEL GONZALES, J. A. GANJIAN, DAN GARCIA, RUBEN GARCIA GALINDO, LEO FLORES, JULIUS DECKER, RAUL M. CARDENAS, MARVIN L. BONDURANT, JOE M. AYALA, JUAN GUILLEN PEREZ, PAUL LOVELIND, ALBERT EDELMAN, WILLARD J. MULLER, JOHN DRELLESHAK, RAYMOND ESTRADA, ROBERT MOLEY, HOWARD MERRITT, HENRY TORRES, JOHN COLLINS, HAROLD HAMMER, BERNIE ORTIZ, VERN O. FREIBURGER, FREEMAN E. RICHARDSON, PETER BACA, RAYMOND H. HOFFMAN, ROBERT H. FOX, DAVID KERSCH, LARRY PARSLEY, FRANK CABRAL, RICHARD LaGASPI, LUIS J. ACOSTA, JOSEPH S. RAMOS, DONALD PALMER, DAVE CASTILLO, WALTER C. HOSMAN, JACK L. HIGHAM, individuals, and DOES I through XX, inclusive,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation; DELTA LINES,

INC., a California corporation, ALLTRANS EXPRESS, INC., a California corporation, SHIPPERS EXPRESS COMPANY, a California corporation; CALIFORNIA MOTOR EXPRESS, L.T.D., a California corporation; DEPENDABLE TRUCK LINE, a California corporation; METROPOLITAN TERMINAL, a California corporation; SIGNAL TRUCKING, a California corporaton, SMITH TRANSPORTATION, a California corporation; DART TRANSPORTATION, a California corporation; WILLIG FREIGHT LINES, a California corporation, TIME D. C., a California corporation; IMPERIAL TRUCKING, a California corporation; STAR TRUCK & WAREHOUSE, a California corporation; KERN VALLEY TRUCKING, a California corporation; VICTORVILLE BARSTOW TRUCKLINES, a California corporation; DiSALVO, a California corporation; CALIFORNIA TRUCKING ASSOCIATION, a California corporation; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 357; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 208; INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 396; INTERNATIONAL BROTHERHOOD OF TEAMSTERS JOINT COUNCIL OF TEAMSTERS LOCAL 42, and DOES I through XX, inclusive,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming a judgment of the United States District Court for the Central District of California. Said judgment affirmed the District Court's denial of permission to file an out-of-time appeal from a final order granting judgment.

OPINION BELOW

The opinion of the aforesaid Court of Appeals is attached hereto as Appendix "A"

JURISDICTION

The decision of the Court of Appeals was filed on April 10, 1973

The jurisdiction of this Court is invoked under 28 U S C § 1254

QUESTIONS PRESENTED

I Did the court abuse its discretion in denying petitioners permission to file an out-of-time notice of appeal?

II Did said denial deprive petitioners of due process of law and the effective assistance of counsel, as guaranteed by the Fifth Amendment, United States Constitution?

III Did the negligence and willful misconduct of petitioners' trial counsel constitute "excusable neglect"?

STATUTES INVOLVED

The statute involved is 28 U S C § 2107, providing that a notice of appeal must be filed within thirty days from the entry of judgment or an additional thirty days if the District Court finds excusable neglect.

RULES INVOLVED

The rules involved are Federal Rules of Appellate Procedure, Rule 4(a), providing, as does 28 U S C § 2107, *supra*, that a notice of appeal must be filed within thirty days from the entry of judgment or within an additional thirty days if the District Court finds excusable neglect, and Rule 26(b), providing that the court may not enlarge the time for filing a notice of appeal

STATEMENT OF THE CASE

The appeal to the Ninth Circuit herein is from an order denying petitioners permission to file an out-of-time notice of appeal from orders granting summary judgment and dismissing the complaint with prejudice, or, in the alternative, an original application to the Ninth Circuit for permission to file such notice of appeal.[1]

The case at bar is one of a series of cases arising out of a so-called "wildcat" Teamsters strike that swept the trucking industry in the Los Angeles area during the spring of 1970 (see, *e.g.*, *Elrod v. Western Conference of Teamsters*, 9th Cir. Nos 71-2755 and 71-2846)

Petitioners originally filed their action in the Superior Court of the State of California, for the County of Los Angeles, against their employers for wrongful discharge and against their unions for breach of duty of fair representation.

---

[1]Petitioners inquired of the Clerk of the Ninth Circuit Court of Appeals as to proper procedure to follow. The Clerk said that he did not know, but to be on the safe side, to proceed both by way of appeal from the order and by an original application to the Ninth Circuit.

The action was removed to the United States District Court for the Central District of California, by two separate petitions for removal, and assigned separate case numbers (71-572-AAH and 71-573-AAH). The cases were later consolidated for hearing (CR 100/1-5; CR 104/1-4) [2]

Petitioners retained David M. Raatz, Esq. to file the action and to represent them after the case was removed to the United States District Court (CR 32/6-10). The matter was set down for hearing on respondents' motions to dismiss and/or for summary judgment on May 17, 1971. Mr. Raatz did not file affidavits in opposition to the affidavits filed by the employer respondents in connection with the summary judgment motions, nor did he appear at the hearing on said motions (CR 20/27-29; CR 32-48). The motions of the union respondents and the employer respondents were granted (CR 101/7-16) [3]

On June 3, 1971, Mr. Raatz advised petitioners' present counsel that he had not attended the hearing of the motions due to the fact that he had been in an automobile accident. Mr. Raatz further advised petitioners' present counsel that he intended to discuss the matter with the trial court or the clerk to see if it was possible to reopen the matter. Mr. Raatz stated that in any event he intended to file a notice of appeal on behalf of his clients from the judgments of dismissal (CR 30/21-30; CR 31/1-2).

---

[2] "CR" refers to the clerk's record. The number preceding the slant bar is the page; the numbers following are the lines.

[3] Judgment granting respondent TIME-DC, INC.'s motion for summary judgment and dismissal of complaint with prejudice was entered on May 17, 1971; judgments granting the remaining respondents' motions for summary judgment and dismissal of complaints with prejudice were entered on June 8, 1971 (CR 101/7-16, 26-30).

About June 20, 1971, several of the petitioners succeeded in locating Mr. Raatz. At that time Mr. Raatz advised them that he had not appeared at the hearing because he had been hospitalized as the result of an automobile accident on the freeway, he also represented that he had conferred with the trial judge in private concerning their case and had already filed a notice of appeal on their behalf (CR 32/16-21; CR 40/12-16, CR 44/16-20). These representations were false. No notice of appeal was ever filed on behalf of the petitioners by Mr. Raatz, although at the time he made the representations it was still possible to file a timely notice of appeal from the several judgments.

Thereafter, the various petitioners spent the better part of the year following the entry of judgments attempting to track down Mr. Raatz (CR 32-48). Mr. Raatz also failed to appear to represent petitioner Juan Perez in a criminal matter pending in the Los Angeles County Superior Court (CR 36/25-32). Mr. Raatz's office was closed down; his telephone and answering service were disconnected; his home was abandoned and up for sale (CR 37/1-12). Complaints were made by several of the petitioners to the State Bar of California, but to no avail (CR 37/13-26; CR 45/1-19, 29-32; CR 46/1-8).

Sometime in December of 1971, petitioners read in the newspapers that a complaint had been filed by the District Attorney of Los Angeles County accusing Mr. Raatz of the commission of 27 felony offenses, ranging from possession of narcotics to grand theft (CR 45/10-14; CR 34/15-21). Petitioners learned that a preliminary examination was to be held in the criminal case pending against Mr. Raatz on February 18, 1972. Several of the petitioners confronted

Mr Raatz outside the courtroom on that date. Mr Raatz again falsely represented to petitioners that he had filed a notice of appeal on their behalf, and that he had turned the case over to Albert Galisky, Esq (CR 34/22-32)

Mr Galisky apparently knew little or nothing about the matter and did not have the file, which supposedly had been left with Mr Raatz's mother or sister (CR 34/28-32; CR 35/1-19) Mr Galisky promised petitioners that he would get the file for them by March 31, 1972 Petitioners never received the file (CR 35/19-21)

On or about May 8, 1972, petitioners consulted their present counsel, who checked the court file and found that no notice of appeal had ever been filed in the matter From that date until about May 30, 1972, petitioners' present counsel obtained affidavits from various petitioners stating their efforts to locate Mr Raatz and to ascertain if a notice of appeal had been filed for use in connection with a proposed motion to file an out-of-time notice of appeal On June 1, 1972, petitioners' present counsel filed the motion together with supporting affidavits However, the filing was cancelled inasmuch as petitioners' present counsel had not obtained a substitution of attorneys signed by Mr Raatz, who was still extremely difficult to locate (CR 57-58; CR 101/37-39) On June 12, 1972, petitioners' present counsel obtained a substitution of attorneys from Mr. Raatz, and, on June 14, 1972, a motion for permission to file an out-of-time notice of appeal was filed All respondents filed opposition thereto

The matter was heard on July 31, 1972, and the motion was denied The order denying the motion was entered on August 18, 1972 (CR 77-78) Petitioners filed a notice of

appeal from said order on September 12, 1972 (CR 88-90)

ARGUMENT

I The Trial Court Abused Its Discretion In Denying Petitioners Permission To File An Out-Of-Time Notice Of Appeal

A Federal Rule of Appellate Procedure 4(a) is not jurisdictional

While F R App P 4(a), which prescribes the time limits within which an appeal may be taken, would appear, at first blush, to be jurisdictional, it is petitioners' contention that it is not, and that the United States District Court, the United States Court of Appeals for the Ninth Circuit, and this Court have inherent equitable power to grant permission to file an out-of-time notice of appeal in order to correct a gross miscarriage of justice

United States Supreme Court Rule 22, which governs the time within which a petition for a writ of certiorari may be filed, would also appear to be jurisdictional However, this Court held in *Taglianetti v United States*, 394 U S 316, 89 S Ct 1099, 22 L Ed 2d 302, that the time limitation for filing a petition for a writ of certiorari is not jurisdictional and that failure to timely file petition did not bar the Court's exercise of discretion to consider the case See also, *Durham v United States* 401 U S 481, 91 S Ct 858, 28 L Ed 2d 200

It is submitted that the failure to timely file a notice of appeal does not bar the Court of Appeals' or the District Court's discretion to permit the filing of an out-of-time notice

of appeal

B Petitioners have shown "excusable neglect" within the meaning of F R App P 4(a) which would warrant the granting of leave to file an out-of-time notice of appeal

The affidavits filed by the petitioners in support of their motion for permission to file an out-of-time notice of appeal (CR 32-48) conclusively show that petitioners were denied their right to a full hearing on the merits of their action, which was summarily dismissed with prejudice due to the dereliction of duty on the part of their then attorney in failing to file affidavits in opposition to the respondents' motions and to appear and argue the matter at the time set for hearing of the motions

Petitioners' affidavits further show that they were denied the right to appeal from the adverse ruling of the trial court due to the fraud and willful misrepresentation practiced on them by their then attorney of record In other words, petitioners were not only denied their day in court by the misconduct of their attorney but also were forever foreclosed from seeking appellate review of the order of dismissal due to his fraud Certainly, this would be excusable neglect as far as the petitioners are concerned

It must be remembered that petitioners are laborers, mostly of Mexican birth or descent, unlearned in the law and the English language, who, to their misfortune, placed their trust in an officer of the court

It is submitted that any neglect on the part of these petitioners is excusable within the meaning of F R App P

4(a).

II. Due Process Of Law Necessarily Includes The Effective Assistance Of Counsel

The Fifth Amendment to the United States Constitution unequivocally declares that "[n]o person shall . . . be deprived of . . . property, without due process of law." Criminal cases have consistently held that due process of law includes the effective assistance of counsel ("The constitutional right to the assistance of counsel in a criminal case (U S Const , 6th Amend , 14th Amend ; see *Gideon v. Wainwright* [1963] 372 U S 335, 342 [9 L Ed 2d 799, 804, 83 S Ct 792, 93 A L R 2d 733]) includes the guarantee that such assistance be 'effective' (See *Powell v. State of Alabama* [1932] 287 U S 45, 72 . . .)" *In re Saunders*, 2 Cal 3d 1033, 1041) There is no reason why a different definition of due process should obtain in a civil case

It is respectfully submitted that a civil litigant is entitled to the effective assistance of counsel the same as a criminal defendant This is especially true where, as here, the civil litigants' cause of action against their former attorney for malpractice is non-existent

III. The Negligence And Willful Misconduct Of Petitioners' Trial Counsel Constituted "Excusable Neglect"

Respondents (Brief for Employer–Not Including TIME-DC, INC , pp 8-11; Union-Appellees' Brief, pp 4-5) contended, in effect, that it is too bad for petitioners that

they selected an attorney who sold them out by failing to act for them, and that since petitioners had a free choice at the time they chose Mr. Raatz to represent them, *c'est la guerre* (or whatever other kindly legal or nonlegal phrase one may wish to use to describe it).

What respondents contended is not true. In the first instance, the State of California, not petitioners, permitted and sanctioned Mr. Raatz to hold himself out as an attorney. Secondly, the United States District Court in the case at bar also represented to petitioners that Mr. Raatz was qualified to practice law before it and, in fact, permitted Mr. Raatz to practice before it. Not only did the court state that Mr. Raatz was qualified to practice before it, but it represented to the petitioners and the public at large that Mr. Raatz was an officer of the court. The records of the District Court show Mr. Raatz as a member of the bar of that court.

Respondents and the courts seem to say that when Mr. Raatz complies with the courts' rules, etc., he is, indeed, an officer of the court, but when he "goofs," whether it be a legal or nonlegal goof, and whether or not someone is physically and/or financially injured as a result thereof, Mr. Raatz is not then an officer of the court.

The types of arguments raised in respondents' briefs are the very matters that give attorneys in general and courts of law in particular a bad name in the eyes of the public.

Until quite recently, if a California attorney was guilty of malpractice, the statute of limitations ran from the time of the act, not the time of the discovery of same by the unsuspecting and trusting (stupid) client. Even the courts have seen the unfairness of such a scheme and held it to be

invalid (*Neel v. Magana, et al.*, 6 Cal 3d 176, 98 Cal. Rptr. 837, 491 P 2d 421)

Courts do not permit clients to control cases; they insist that the client let the attorney handle the case. That is, until something goes wrong Then, there is the pious cry that the client is stuck because he selected the attorney and because the client should have done something. Of course, no one ever says what it is the client should have done during this period of time when (1) he was unable to say or do anything because the court insisted that the attorney handle the matter, and (2) during the same period of time the client, who is a nonlawyer, is forced to rely on the expertise, etc., ad nauseum, of his attorney–(that is why he has an attorney –because he doesn't know the law and procedure and hires an attorney who is supposed to know it)

Here, we have an attorney who is up on a number of criminal charges. (The records of the Superior Court of the State of California for the County of Los Angeles, Criminal Case No. A-281469, of which the Court may take judicial notice, show that Mr. Raatz was convicted by a jury of violations of sections 11530 of the Health and Safety Code and 487.3 of the Penal Code and was, on December 4, 1972, committed to the California Department of Corrections pursuant to Penal Code § 1203.03). It is true that one would make a mistake to assume that this particular lawyer will be disbarred for what he has done in both the criminal context and in terms of what damage he has done to the petitioners at bar. The affidavits at bar show that his home has been sold, that his office has been closed, his phone disconnected, etc. Assuming that he is or is not disbarred, it is clear that he is either broke or judgment proof or both (if there is a distinction).

And assuming he eventually goes to prison (a commitment pursuant to Penal Code § 1203.03 is not a final commitment), it is quite clear that a civil lawsuit would be a futile gesture. Yet, respondents ask the Court, with a straight face, to tell petitioners that they are too late so far as an appeal goes, but they have a civil remedy against Mr. Raatz, namely, sue him! Again, it is no wonder that the public in general thinks that the law is a farce. To that extent, it is a farce.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the court abused its discretion in denying petitioners permission to file an out-of-time notice of appeal, and that this Court should grant certiorari and reverse the order appealed from, with directions to the court to permit petitioners to file a notice of appeal from the judgments of dismissal of the complaint with prejudice entered herein on May 17, 1971 and June 8, 1971.

Respectfully submitted,

DON EDGAR BURRIS

Attorney for Petitioners

APPENDIX

APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit

PHILLIP BURROUGHS, et al , Plaintiffs-Appellants, vs STERLING TRANSIT COMPANY, a California Corporation, et al , Defendants-Appellees

No 72-2699

[Filed April 10, 1973]

Appeal from the United States District Court for the Central District of California

Before: HUFSTEDLER, WRIGHT, and TRASK, Circuit Judges

MEMORANDUM

This appeal is taken from the district court's denial of permission to file an out-of-time appeal from a final order granting judgment We affirm

Judgment granting the defendant TIME-DC, Inc.'s motion for summary judgment and dismissal of complaint with prejudice was entered on May 17, 1971; judgments granting the remaining defendants' motions for summary judgment and dismissal of complaint with prejudice were entered on June 8, 1971 The motion for permission to file an out-of-time notice of appeal was filed on June 19, 1972, more than a year after final judgment, as appellants admit

Under 28 U.S.C. § 2107 and Rule 4(a) Fed. R. App. P., a notice of appeal must be filed within thirty days from the entry of judgment or an additional thirty days if the district court finds excusable neglect is shown. Rule 26(b) Fed. R. App. P. provides that the court may not enlarge the time for filing a notice of appeal. Together with other circuits we have held that this is jurisdictional. *Alexander v. Sacha*, 439 F.2d 742 (9th Cir. 1971); *Lathrop v. Oklahoma City Housing Authority*, 438 F.2d 914 (10th Cir. 1971). No relief may be granted.

The appeal is dismissed for lack of jurisdiction.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY 8TH, 1973, I served the within PETITION FOR WRIT OF CERTIORARI (BURROUGS, et al. v. STERLING TRANSIT COMPANY, etc., et al.) on the following named parties by depositing three copies, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

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606 South Olive Street, Suite 1922
Los Angeles, California 90014

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is ture and correct.

Executed on MAY 8TH, 1973, at HUNTINGTON BEACH, CALIFORNIA.

Dean-Standefer, 326½ Main St., Huntington Beach, Ca.
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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1520

PHILLIP BURROUGHS, *et al.*,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation, *et al.*,

Respondents.

On Certiorari to the United States Court of Appeals for the Ninth Circuit.

Union-Respondents' Brief in Opposition to Petition for Certiorari.

Statement of the Case.

This brief is being submitted on behalf of the Union-Respondents, which are Joint Council of Teamsters No. 42; Local Freight Drivers Union, Local No. 208; Freight Handlers, Clerks & Helpers, Local Union No. 357; and Package & General Utility Drivers, Local Union No. 396.

In addition to the facts stated in the Petition for Writ of Certiorari, the record shows that more than 30 days prior to the filing of the motion to permit a late notice of appeal, at least some of the petitioners were aware that an appeal had not been filed for them by

their prior attorney. (The motion was lodged in the district court on June 14, 1972 [CR 28]; one of the petitioners' affidavits in support of the motion is dated April 28, 1972, or 45 days prior to the lodging of the motion [CR 43][1]; and another of the petitioners whose affidavit is dated May 5, 1972, states that "to this date [*i.e.*, May 5, or 38 days prior to the lodging of the motion], we have found no evidence that an appeal was made" [CR 35/22-23].)

---

[1]While it is true, as stated in the petition, that some of the petitioners are of Spanish surname, this petitioner is not. Moreover, there is nothing in the record to indicate, as stated in the petition at 9, that "petitioners are . . . mostly of Mexican birth or descent, unlearned in the law and the English language. . . ."

ARGUMENT.

None of the grounds contained in Supreme Court Rule 19 for seeking certiorari are presented by the petitioners. Nor do any exist. Further, even if this Court were to consider this matter a proper one for review, on the merits both the district court and the court of appeals rendered the correct decisions.

A. The Trial Court Had No Discretion Because the Timely Filing of a Notice of Appeal Is Jurisdictional.

The petitioners make no mention in their brief of the numerous cases which hold FRAP No. 4(a) to be jurisdictional, not permissive. *See, e.g., Alexander v. Sacha,* 439 F.2d 742 (9th Cir. 1971); *Lathrop v. Oklahoma City Housing Auth.,* 438 F.2d 914 (10th Cir. 1971), *cert. denied,* 404 U.S. 840 (1971). There is no conflict in the circuits on this score. *Weedon v. Gaden,* 419 F.2d 303, 307-08 (D.C. Cir. 1969).

The argument by the petitioners is made, rather, that FRAP No. 4(a) should be analogized to United States Supreme Court Rule No. 22. The analogy is faulty for these reasons.

First, FRAP No. 26(b) states that "the court may not enlarge the time for filing a notice of appeal." No similar injunction is contained in the Supreme Court Rules. *Compare* Supreme Court Rule No. 34 *with* FRAP No. 26(b).

Second, the Advisory Committee's Notes to FRAP No. 3 read as follows:

> "Rules 3 and 4 combine to require that a notice of appeal be filed with the clerk of the district court within the time prescribed for taking an ap-

peal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional,' United States v. Robinson, 361 U.S. 220, 224, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960), compliance with the provisions of those rules is of the utmost importance."

In light of the jurisdictional status of FRAP No. 4 (a), there is no basis upon which to examine the petitioners' other points. But even if the Court should, these points too lack merit.

B. Assuming Discretion in the District Court to Grant the Petitioners' Motion, It Was Properly Denied.

No authorities are presented for the proposition that the reasons set forth by the petitioners for not sooner filing a notice of appeal constitute "excusable neglect."

Moreover, the petitioners' own affidavits show that at least as early as April 28, 1972, 45 days prior to the time the motion was finally lodged with the district court, some of them contacted their present counsel and signed the affidavit in support of their motion.[2] Yet no attempt to file a motion was made until June 1, 1972 [CR 57/27-28], and it was not until June 14 that it was successfully lodged.

The court below held there to be no excusable neglect [CR 84/7-11]. In light of the long period that elapsed between the time petitioners first contacted their present counsel and the time the motion was eventually lodged, the court was fully justified in relying upon the petitioners' failure to more timely file their motion as evidence that the past neglect was not excusable. *See Weedon v. Gaden,* 419 F.2d 303, 307-08

[2]See note 1, *supra.*

(D.C. Cir. 1969) (lack of notice to petitioners or their counsel that order had been entered, not excusable neglect for not filing timely appeal).

C. There Is No Lack of Due Process Because the Petitioners Have a Remedy.

Unlike the situation of a defendant in a criminal case whose ineffective counsel lands the defendant in jail, the petitioners may have the right to file a malpractice action against their former attorney and recoup any loss they may have suffered. Hence, the analogy to criminal law is inapposite. The issue of whether the attorney may be judgment-proof (no evidence of this appears in the record) is not relevant to the rule of law involved.

Conclusion.

For these reasons, the petition should be denied.

Respectfully submitted,

JULIUS REICH,
By JULIUS REICH,
Attorney for Union-Respondents.

BRUNDAGE, NEYHART, MILLER,
REICH & PAPPY,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 1520

PHILLIP BURROUGHS, *et al.*,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent T.I.M.E.-DC, Inc. in Opposition.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 1520

PHILLIP BURROUGHS, *et al.*,

Petitioners,

vs.

STERLING TRANSIT COMPANY, a California corporation, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondent T.I.M.E.-DC, Inc. in Opposition.

Counter-Statement of Questions Presented.

1. Did the courts below properly decide that the District Court had no jurisdiction to permit the filing of an out-of-time appeal in a civil matter?

2. Were the courts below precluded from applying the mandatory, jurisdictional time limits for appeals in civil matters by the Petitioners' contention that the due process clause of the Fifth Amendment guarantees plaintiffs in civil actions the same right to the effective assistance of counsel as is guaranteed under the Sixth Amendment to defendants in criminal prosecutions?

Constitutional Provisions, Statute and Rules Involved.

The relevant portions of the Fifth and Sixth Amendments to the Constitution of the United States, the Judicial Code, 28 USC Section 2107, and the Federal Rules of Appellate Procedure, Rules 4(a) and 26(b) are set forth below:

Fifth Amendment

No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

28 U.S.C. Section 2107

Time for appeal to court of appeals. Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

Rule 4(a), Federal Rules of Appellate Procedure

Appeals in Civil Cases. In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a

controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from . . . .

* * *

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for extension is made after such time has expired, it shall be made by motion with such notice as the court shall deem appropriate.

Rule 26(b), Federal Rules of Appellate Procedure

Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal.

Statement of the Case.

On May 17, 1971, the motion of Respondent T.I.M.E.-DC, INC. for summary judgment and dismissal of Petitioners' complaint with prejudice was granted by the United States District Court for the Cen-

tral District of California [R 7:17-8:14].[1] Judgment was entered on the court's docket on May 18, 1971 [R 9]. On May 19, 1971, the clerk of the district court served notice of the entry of judgment on the Petitioners' attorney of record [*Ibid.*].

On June 19, 1972, more than a year after final judgment, Petitioners moved the district court for permission to file an out-of-time notice of appeal [R 28-29]. Said motion was denied by the district court on the ground that the court had no jurisdiction to permit the filing of such an out-of-time appeal [R 77-78]. Notice of the order denying Petitioners' motion was served on all parties on August 25, 1972 [R 81-82].

On September 11, 1972, Petitioners served notice of appeal from the district court's order denying their motion to permit the out-of-time filing of a notice of appeal from the judgment of May 17, 1971 [R 88-90]. On April 10, 1973, the United States Court of Appeals for the Ninth Circuit affirmed the district court's order on the ground that under Rules 4(a) and 26(b) the court had no jurisdiction to permit the filing of a notice of appeal over one year after entry of final judgment (Petition For Certiorari, App. A).

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[1]"R" refers to the Record. Page numbers precede the colon and line numbers follow.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Preliminary Statement.

The questions presented in the Petition (Petition For Certiorari, p. 3) are clearly not cognizable under Rule 19 of this Court. There is no reason for this Court to grant a writ of certiorari to review the question of whether the lower court did or did not "abuse its discretion" in denying Petitioners permission to file an out-of-time notice of appeal. Likewise there is no reason for this Court to review the factual question whether the conduct of Petitioners' trial counsel constituted "excusable neglect".

As will be demonstrated below the decisions below are consistent with the decisions of this Court and every Court of Appeals with respect to the jurisdictional nature of the time limits for filing a notice of appeal in civil matters. Lastly, there is simply no need for this Court to consider the contention that the due process clause of the Fifth Amendment guarantees the plaintiffs in a civil action the same right to the effective assistance of counsel that is afforded to defendants in criminal prosecutions by virtue of the mandate of the Sixth Amendment.

II.

The Decisions of the Courts Below Holding That the Time Limits for Filing an Appeal in a Civil Action Are Jurisdictional, Are Consistent With the Decisions of This Court and All of the Courts of Appeals Which Have Considered This Question.

Under 28 U.S.C. Section 2107 and Rule 4(a) of the Federal Rules of Appellate Procedure, a notice of appeal must be filed within thirty days from the entry of judgment or within an additional thirty days if the district court finds that excusable neglect has been shown. Rule 26(b) of the Federal Rules of Appellate Procedure provides that the court may not enlarge the time for filing a notice of appeal.

The decisions of the courts below holding that these time limits are mandatory and jurisdictional are in accord with the decisions of every Court of Appeals which decided this issue. *Schaefer v. National Bank of Lincolnwood,* 465 F.2d 234, 236 (7th Cir., 1972); *Torockio v. Chamberlain Mfg. Co.,* 456 F.2d 1084, 1085 (3rd Cir., 1972); *Lathrop v. Okalhoma City Housing Authority,* 438 F.2d 914 (10th Cir., 1971); *Gulf-Tampa Drydock Co. v. Vessel "Virginia Trader",* 435 F.2d 150, 151 (5th Cir., 1970); *Levisa Stone Corp. v. Elkhorn Stone Co.,* 411 F.2d 1208 (6th Cir., 1969), cert. den. 397 U.S. 925 (1970); *Winchell v. Lortscher,* 377 F.2d 247, 251 (8th Cir., 1067); *Edwards v. Doctors Hospital,* 242 F.2d 888, 890-891 (2nd Cir., 1957), cert. denied, 356 U.S. 930.

These decisions are consistent with the dictates of this Court in *United States v. Robinson,* 361 U.S. 220 (1960). In that case, this Court stated that the time limit under former Rule 6(b) of the Federal Rules of

Civil Procedure which governed the filing of a notice of appeal "was mandatory and jurisdictional and could not be extended regardless of excuse." *Id.* at 229.

Petitioners have failed to demonstrate any need for further review of this issue in this case. The cases cited by Petitioners involved the discretionary time limits on petitions for certiorari in *criminal* cases under this Court's own Rule 22(2) [Petition For Certiorari, p. 8]. The distinction between the nonjurisdictional time limits set by this Court in its own rules and the time limits set by Act of Congress was specifically noted by this Court in *Schacht v. United States,* 398 U.S. 58 (1970), as follows:

> "Rule 22(2) contains no language that calls for so harsh an interpretation, and it must be remembered that *this rule was not enacted by Congress* but was promulgated by this Court under authority of Congress to prescribe rules concerning the time limitations for taking appeals and applying for certiorari in criminal cases. See 18 U.S.C. §3772; Rule 37, Fed. Rules Crim. Proc. *The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional* and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64 [Emphasis added].

By contrast, the time limits for petitions for certiorari in *civil* cases have been prescribed by Congress in 28 U.S.C. Section 2101(c) (just as Congress has prescribed time limits for the filing of an appeal in 28 U.S.C. Section 2107), and this Court has held that where Congressional time limits on certiorari are exceeded, "[t]his deprives us of jurisdiction to consider the merits of the

decree. . . ." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 418 (1923). *Accord: Department of Banking of Nebraska v. Pink*, 317 U.S. 264, 268 (1942); *Monks v. Lee*, 317 U.S. 590 (1942); *Bunn v. Atlanta*, 317 U.S. 666 (1942).

In short the decisions below are consistent with the above cited decisions of this Court and the Courts of Appeals in civil cases and there is no need for further review in this case.

III.

Petitioners' Contention That They Should Be Guaranteed the Effective Assistance of Counsel in Prosecuting Their Civil Action Borders on the Frivolous and Need Not Be Considered by This Court.

Petitioners contend that plaintiffs in civil actions should be entitled to the same guarantee of the effective assistance of counsel as defendants in criminal actions. Petitioners cite no authority for such a Constitutional guarantee in civil proceedings.

Such a contention borders on the frivolous. The Sixth Amendment which establishes the right to the assistance of counsel, by its own language, applies only to defendants in criminal prosecutions and the cases cited by Petitioners so hold (Petition for Certiorari, p. 10).

Moreover, this Court long ago made it clear that the right of appeal in federal civil cases is not essential to due process of law. *Luckenbach Steamship Co. v. United States*, 272 U.S. 533 (1926). Thus the right of appeal in a case such as this is a "matter of grace" and is available only to the extent granted by Congress. *Id.* at 536-7. Petitioners herein have admittedly failed to comply with the jurisdictional time limits prescribed

by Congress and their attempt to avoid these time limits under the guise of the Fifth Amendment is transparent.

Petitioners have failed to raise any Constitutional issue for review by this Court.

Conclusion.

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MITCHELL, SILBERBERG & KNUPP,
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-1520

PHILLIP BURROUGHS, et al., *Petitioners,*

vs.

STERLING TRANSIT COMPANY, a California corporation, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR EMPLOYER-RESPONDENTS NOT INCLUDING T.I.M.E.-DC, INC. IN OPPOSITION

OPINIONS BELOW

The Order denying Petitioners' Motion to File Late Notice of Appeal of the U. S. District Court for the Central District of California is appended as Appendix A herein.

The written opinion of the United States Court of Appeals for the Ninth Circuit is reported at F.2d

..... (9th Cir. 1973, Case No. 72-2699) and is set forth as Petitioners' Appendix A.

QUESTIONS PRESENTED

I. In light of well-recognized and uniformly followed authority that the timely filing of a notice of appeal is jurisdictional, should this Court grant review?

II. Where the District Court's finding of an absence of excusable neglect is not clearly erroneous, should this Court grant review?

STATUTE INVOLVED

28 USC 2107 provides:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

"In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

"This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963; May 24, 1949, c. 139, §§ 107, 108, 63 Stat. 104."

RULES INVOLVED

I. Rule 4(a) of the Federal Rules of Appellate Procedure. The revelant sections provide:

"In a civil case (including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein) in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from. . . .

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivision has expired; but if a request for an extension is made after such time has expired, it shall be made by

motion with such notice as the court shall deem appropriate."

II. Rule 26(b) of the Federal Rules of Appellate Procedure. The relevant paragraph provides:

"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal."

III. Rule 52(a) of the Federal Rules of Civil Procedure. The relevant sentence reads:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of facts.

This case involves a complaint for alleged wrongful discharge of certain participants in the illegal Teamsters strike which occurred in Los Angeles and in other areas of the United States during the Summer of 1970. The complaint was originally filed in the Superior Court of the State of California, for the County of Los Angeles, and was subsequently removed to the United States District Court for the Central District of California (CR 104).[1] The case

[1]The symbol "CR" refers to the Clerk's Transcript of the proceedings in the District Court.

was assigned to the Honorable A. Andrew Hauk and given Case No. 71-572-3-AAH. Thereafter, Respondent (hereinafter called "Respondent-Employers")[2] and other respondents filed Motions to Dismiss and for Summary Judgment. On May 17, 1971, a hearing was held on these Motions. There was no appearance by Petitioners' attorney although papers had been filed in opposition to the Motion to Dismiss (CR 104). After consideration of the pleadings as well as the Affidavits and Points and Authorities presented to the court, the Motions were granted. Findings of Fact and Conclusions of Law in Summary Judgment and Order for Dismissal submitted by Respondent T.I.M.E.-DC, Inc. were signed by the judge and filed. On June 7, 1971, Respondent's Notice of Entry of Judgment showing service on counsel for Petitioners was also filed with the court. On June 8, 1971, Findings of Fact and Conclusions of Law and the Order and Judgment of Dismissal on Summary Judgment dismissing the complaint with prejudice as to the Respondent-Employers and Findings of Fact and Conclusions of Law and the Judgment dismissing the complaint as to Respondent-Union were entered (CR

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[2]The term "Respondent-Employers" is used to provide a concise reference to the Respondents on whose behalf this brief is submitted. Respondent-Employers is not used here to refer to T.I.M.E.-DC, Inc., but includes only California Trucking Association, Alltrans Express California, California Motor Express, Dart Transportation Service, Delta Lines, Inc., Dependable Trucking Co., DiSalvo Trucking Company, Imperial Truck Lines, Inc., Kern Valley Trucking, Metropolitan Terminals, Shippers Express, Signal Trucking Service, Ltd., Smith Transportation Co., Star Truck & Warehouse Corporation, Sterling Transit Co., Inc., Victorville-Barstow Truck Line, and Willig Freight Lines.

105). At the same time the Clerk's Notice of Entry of Judgment, dated June 9, 1971, was sent to all parties (CR 27). On June 24, 1971, Respondent-Employers filed a Notice to Tax Costs incurred by them in defense of the action. Said Notice contained an affidavit showing service on Petitioners (CR 144-145).

It was not until June 9, 1972, that Petitioners, through their new counsel, took any action to appeal the final judgments which had been entered in May and June, 1971 (CR 105). This action consisted of Petitioners' Motion to File a Late Notice of Appeal. Thereafter, Respondents opposed this Motion on the grounds, *inter alia*, (1) that the filing of such notice was untimely in that it did not comply with Rule 4(a) of the Federal Rules of Appellate Procedure (hereinafter F.R.A.P.); (2) that the trial court was without jurisdiction at that time to extend the period for filing a notice of appeal; and (3) that even if the court had jurisdiction, there was no showing of "excusable neglect" sufficient to warrant an extension of time for the filing of a notice of appeal. After consideration of the arguments of counsel, the District Court denied Petitioners' Motion to File a Late Notice of Appeal on the above-stated grounds urged by Respondents.

B. The decision of the Court of Appeals.

The Petitioners sought to appeal the adverse ruling of the District Court, while alternatively making an original application for permission to file an untimely notice of appeal.

Stating that it, "together with other circuits", had held the requirements of Rule 4(a), F.R.A.P., to be jurisdictional, the Court of Appeals for the Ninth Circuit dismissed the appeal for lack of jurisdiction.

ARGUMENT

I

THE PETITION PRESENTS NO NEW OR UNIQUE QUESTION TO BE DECIDED BY THE COURT

A. The Petition fails to present any basis for review by this Court.

Rule 19 of the Rules of the Supreme Court of the United States establishes the principle that review by this Court is warranted only where there are special and important reasons therefor. Inasmuch as the Petition seeks to raise an issue which has long and uniformly been settled by the Appellate Courts (see Arguments B, C and D, *infra*), Petitioners must show special and important reasons for this Court to review the lower court's decision. Petitioners have simply failed to do so. Although Petitioners discuss the merits of their case, the Petition remains utterly silent as to the threshold question of reviewability. Accordingly, the Petition should be denied.

B. The lower courts were without jurisdiction to grant permission to file an untimely notice of appeal.

It is undisputed that more than a year passed after the entry of Judgment before Petitioners made any effort to file a notice of appeal. Although Petitioners admit that under such circumstances the filing of a Notice of Appeal would be outside the time limit prescribed by Rule 4(a), F.R.A.P.,[3] they nonetheless attempt to disregard the clear language of this rule in their Petition.

Respondent-Employers submit, as the District Court and the Court of Appeals found, that compliance with Rule 4(a), F.R.A.P., is a jurisdictional matter. This position has been well-recognized by the courts which have consistently held that the failure to appeal within the time limit prescribed constitutes a jurisdictional defect which neither the court nor the parties can remedy. *Alexander v. Sacha,* 439 F.2d 742 (9th Cir. 1971); *Diffenderfer v. Homer,* 408 F.2d 1344, 1346 (5th Cir. 1969); *Winchell v. Lortscher,* 377 F.2d 247, 251 (8th Cir. 1967); *Edwards v. Doctors Hospital, Inc.,* 242 F.2d 888 (2d Cir. 1957); *Weedon v. Gaden,* 419 F.2d 303 (D.C. Cir. 1969); *Lathrop v.*

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[3]Rule 4(a), F.R.A.P., provides in relevant part as follows:

"In a civil case . . . in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the entry of the judgment or order appealed from; . . .

* * *

"Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision."

Oklahoma City Housing Authority, 438 F.2d 914 (10th Cir. 1971). Cf., *Buckley v. United States*, 382 F.2d 611 (10th Cir. 1967). And the time for filing a Notice of Appeal may not be enlarged. Rule 26(b), F.R.A.P.;[4] *Alexander v. Sacha, supra; Edwards v. Doctors Hospital, Inc., supra.*

In *Lathrop v. Oklahoma City Housing Authority, supra*, the Court of Appeals for the Tenth Circuit held that appellant's failure to file a timely notice of appeal necessitated dismissal of the attempted appeal despite appellant's contention that they had not received notice of the District Court's denial of timely post-trial motions filed by appellant. The Court explained its dismissal of the appeal as follows:

> "A court of appeals acquires jurisdiction of an appeal from a district court decision only upon the filing of a timely notice of appeal. This requirement is mandatory and jurisdictional. . . . *In the instant case, we are concerned with 28 USC Sec. 2107 and Rule 4(a) Federal Rules of Appellate Procedure and are aware of no cases that hold other than that a timely notice of appeal is mandatory and jurisdictional.* [Citations omitted]." [Emphasis supplied.] 438 F.2d at 915.

Other recent decisions also establish that timely filing of a notice of appeal is both mandatory and jurisdictional. *Schaefer v. National Bank of Lincoln-*

[4]Rule 26(b), F.R.A.P., provides in relevant part as follows:
"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, . . ."

wood, 465 F.2d 234, 236 (7th Cir. 1972); *Torockio v. Chamberlain Mfg. Co.,* 456 F.2d 1084, 1085 (3d Cir. 1972); *Gulf-Tampa Dry Dock Co. v. The Vessel "Virginia Trader",* 435 F.2d 150, 151 (5th Cir. 1970); *Fitzsimmons v. Yeager,* 391 F.2d 849 (3d Cir. 1968), *cert. den.,* 393 U.S. 868 (1968).

Under Rule 4(a), F.R.A.P., Petitioners were required to file their notice of appeal within thirty days after entry of judgment. Upon showing of "excusable neglect", the District Court could have extended the time for filing of a notice for an additional period not to exceed thirty days, thereby providing Petitioners with a maximum sixty-day period within which to perfect their appeal. Because no notice of appeal was filed within this period authorized by Rule 4(a), F.R.A.P., there is no jurisdictional basis for further proceedings herein.

To support their contention that Rule 4(a), F.R.A.P., does not establish jurisdictional requirements, Petitioners rely on *Taglianetti v. United States,* 394 U.S. 316 (1969), in which this Court held that the time limitation for filing writs of certiorari, as contained in Rule 22 of the United States Supreme Court Rules, is not jurisdictional. The Petitioners' theory seems to be that this Court should apply the same relaxed interpretation to Rule 4(a), F.R.A.P., since it, like Rule 22, establishes a time limitation. Petitioners, however, have failed to recognize basic differences between the two rules.

In *Taglianetti, supra,* this Court merely recognized its inherent ability to interpret rules which it had itself imposed for the conduct of business. Since this

Court had promulgated Rule 22, it was free to interpret it as being nonjurisdictional. Rule 4(a), F.R.A.P., on the other hand, is more than an order of this Court. Rule 4(a) serves to incorporate into the Federal Rules of Appellate Procedure the time limitations for taking appeals previously established by 28 USC 2107,[5] and thus has the force and effect of a Congressional enactment. Accordingly, it is not subject to discretionary relaxation by the judiciary. This Court has indicated its recognition of the above distinction. See *Schacht v. United States,* 398 U.S. 58, 64 (1970).

Additionally, Rule 22 stands alone in that it is not modified by any other Rule. But Rule 4(a), F.R.A.P., is given greater impetus and strength by Rule 26(b), F.R.A.P., which states that "the Court may not enlarge the time for filing a notice of appeal." Additionally, when Rule 4(a) is read in conjunction with Note No. 3 of the Advisory Committee to the Federal Rules of Appellate Procedure, the intent of the Framers of the Rule as to jurisdiction becomes absolutely clear. This Note states:

> "Rules 3 and 4 combine to require that a notice of appeal be filed with the clerk of the district

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[5]28 USC provides in relevant part as follows:

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

* * *

"The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree."

> court within the time prescribed for taking an appeal. Because the timely filing of a notice of appeal is 'mandatory and jurisdictional', *United States v. Robinson,* 361 U.S. 220, 224, 80 S.Ct. 282, 4 L. Ed. 2d 259 (1960), compliance with the provisions of those rules is of the utmost importance."

Petitioners *have not cited one case* dealing with an interpretation of Rule 4(a), F.R.A.P., which indicates in any respect that compliance with its provisions is not jurisdictional or that a court can extend the time period for filing a notice of appeal for more than an additional thirty days. Respondent-Employers submit that the reason for the absence of any citation is because the law is so clearly established that *the timely filing of a notice of appeal is both a mandatory and jurisdictional prerequisite to any appeal herein.*

C. The District Court did not abuse its discretion in finding an absence of "excusable neglect".

Even assuming *arguendo* that jurisdiction existed, the Petition must nonetheless be denied since the Appellate Courts must accept the finding of the District Court that there was no "excusable neglect" unless such finding of fact is "clearly erroneous". Rule 52(a) of the Federal Rules of Civil Procedure; *Uhlhorn v. U. S. Gypsum Co.,* 366 F.2d 211, 218 (8th Cir. 1966), *cert. den.,* 385 U.S. 1026 (1967). Even if the record were susceptible of diverse inferences, the District Court's finding is conclusive on review unless it is "clearly erroneous". *Hoppe v. Rittenhouse,* 279 F.2d 3, 9 (9th Cir. 1960).

Petitioners contend that their prior attorney, Mr. Raatz, acted negligently by not filing a notice of ap-

peal. Even assuming that Mr. Raatz was negligent, it is well established that such negligence is not "excusable neglect" within the meaning of Rule 4(a), F.R.A.P., which would warrant an extension of time within which to file a notice of appeal. *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962); *Harlan v. Graybar*, 442 F.2d 425 (9th Cir. 1971); *Russo v. Flota*, 303 F.Supp. 1404 (S.D. N.Y. 1969); *Frank v. Amsterdam Cas. Co.*, 27 F.R.D. 258 (E.D. Pa. 1961).

In the *Frank* case, the defendant asked its attorney to file a notice of appeal. However, the lawyer left town without telling the defendant and never did file the appeal. Eventually, the defendant hired a new attorney who learned that the appeal was never taken. By the time the new attorney found out that the notice of appeal had not been filed, the time period for filing had run. Nonetheless, the defendant sought an extension of time for appeal. The court noted the existence of a strong policy favoring finality of litigation and held that no extension of the time for appeal was warranted. The court held that the defendant was bound by the action of its attorney even though the attorney had been acting contrary to the orders of the defendant.

In an analogous case involving attorney misconduct, this Court articulated the following in *Link v. Wabash R.R. Co., supra*, at 633-634:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the

> acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"

Petitioners were free to select any attorney they desired. They chose Mr. Raatz and quickly became aware of his inaccessibility. If they were dissatisfied with Mr. Raatz' legal work, they should have immediately discharged him and engaged a new attorney. Instead, Petitioners waited well over a year to engage new counsel. They should not now be allowed to avoid the consequences of Mr. Raatz' omission in filing a notice of appeal.

Petitioners detailed in several affidavits their experiences covering approximately a year during which they allegedly attempted to contact their prior attorney, Mr. Raatz. Also, various Petitioners indicated that they had made an effort to determine whether or not an appeal was made and that during this period of time they were unable to find any evidence that an appeal was made (CR 22-23, 35). Significantly, some of the affidavits indicating that Petitioners could find no evidence of an appeal were dated more than thirty days prior to the filing in the District Court of the Motion to Permit Filing of a Late Notice of Appeal (CR 28, 35, 43). Thus, even after Petitioners had discovered their plight and hired new counsel, they still failed to expeditiously prosecute their claims. Based on these affidavits as well as the entire record,

the District Court specifically found that there was no "excusable neglect" which would warrant the Court's granting an extension of time within which to file a notice of appeal (CR 78). Under such circumstances, the District Court's finding of the absence of "excusable neglect" cannot be said to be clearly erroneous and should not be subject to further review.

D. Petitioners were not deprived of due process of law.

In an attempt to evade the well-established line of authority that attorney negligence does not constitute "excusable neglect" (as discussed *supra*), Petitioners argue that the Fifth Amendment to the Constitution requires that the civil litigant receive effective assistance of counsel, that their former attorney did not sustain this duty of representation, and that they have therefore been denied their right to due process of law. Such argument is totally without merit.

It is fundamental that the Bill of Rights to the Constitution protects various basic rights of an individual from encroachment through the arbitrary exercise of *governmental* power. Accordingly, while the Fifth Amendment is designed to prevent the deprivation of an individual's life, liberty or property by arbitrary *governmental* action, it does not serve to protect the citizen from *individual*, non-governmental activity. *Corrigan v. Buckley*, 271 U.S. 323, 331 (1926).

All of the cases relied upon by Petitioners stand for the proposition that due process requires that a

defendant in a criminal prosecution be represented by effective counsel. These cases thus recognize and support the fundamental purpose of the Fifth Amendment in protecting the individual from *governmental* prosecution without due process of law. They do not, however, support Petitioners' contention that "the civil litigant is entitled to the effective assistance of counsel the same as the criminal defendant."

Furthermore, *it is significant that Petitioners have not cited one case in support of their theory.* Respondent-Employers submit that Petitioners' failure to provide case authority is indicative of the fact that due process of law is not a viable issue.

II

THE PETITION DOES NOT PRESENT A CASE WHERE THE COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH ANOTHER COURT OF APPEALS

The instant Petition not only fails to raise any important question of federal law requiring decision by this Court, but presents a Court of Appeals decision which is in complete harmony with the decisions of other circuits. Significantly, the Petitioners have cited no authority contrary to the decision rendered by the Court below. The reason is simply that the other courts have uniformly held that compliance with Rule 4(a), F.R.A.P., is an essential jurisdictional prerequisite to an appeal. See cases in Argument I, *supra*.

CONCLUSION

As the foregoing analysis demonstrates, there is no basis for review by this Court. It is well established that Rule 4(a), F.R.A.P., is both mandatory and jurisdictional. However, even if there were no question of jurisdiction, there is insufficient evidence to set aside the District Court's finding of an absence of "excusable neglect". Furthermore, the alleged negligence of Petitioners' prior attorney does not constitute a denial of due process of law. Respondent-Employers respectfully submit, therefore, that the Petition for a Writ of Certiorari should be denied.

Dated, June 8, 1973.

Respectfully submitted,

GEORGE J. TICHY, II,

LITTLER, MENDE'SON & FASTIFF,

Counsel for Employer-Respondents California Trucking Association, Alltrans Express California, California Motor Express, Dart Transportation Service, Delta Lines, Inc., Dependable Trucking Co., DiSalvo Trucking Company, Imperial Truck Lines, Inc., Kern Valley Trucking, Metropolitan Terminals, Shippers Express, Signal Trucking Service, Ltd., Smith Transportation Co., Star Truck & Warehouse Corporation, Sterling Transit Co., Inc., Victorville-Barstow Truck Line, and Willig Freight Lines.

(Appendix A Follows)

Appendix A

United States District Court
for the Central District of California

Civil No. 71-572-3-AAH
(Consolidated)

Phillip Burroughs, et al.,
Plaintiffs,
vs.
Sterling Transit Company, et al.,
Defendants.

[Filed Aug. 18, 1972]

ORDER DENYING PLAINTIFFS' MOTION TO PERMIT PLAINTIFFS TO FILE LATE NOTICE OF APPEAL

Plaintiffs' Motion for an Order Permitting Plaintiffs to File Late Notice of Appeal from Judgment of Dismissal having come on regularly before this Court on July 31, 1972, Plaintiffs having been rep-

resented by Don Edgar Burris, Esq., Defendant T.I.M.E.-DC, Inc., having been represented by Harry J. Keaton, Esq., of Rutan & Tucker, the other Employer-Defendants having been represented by George J. Tichy, II, Esq., of Littler, Mendelson & Fastiff, and the Union-Defendants having been represented by Richard J. Davis, Jr., Esq., of Brundage, Neyhart, Miller, Ross & Reich, and the Court having considered the record heretofore had herein, including the Order and Judgment in favor of T.I.M.E.-DC, Inc., filed May 18, 1971, the Order and Judgment in favor of the other Employer-Defendants, filed June 8, 1971, and the Judgment in favor of the Union-Defendants, filed June 8, 1971, the motion papers of Plaintiffs, as well as the points and authorities and other matters submitted by the parties herein, and having determined:

1. That the filing herein of any notice of appeal by Plaintiffs would be untimely;

2. That the Court is presently without jurisdiction to extend the time period for filing a notice of appeal; and

3. That even if the Court presently had jurisdiction to extend the time period for filing a notice of appeal, there has been no "excusable neglect" within the meaning of Rule 4(a), Federal Rules of Civil Procedure, which would warrant the granting of said extension;

It Is Hereby Ordered that Plaintiffs' Motion for An Order Permitting Plaintiffs to File Late Notice of Appeal be, and it hereby is, denied.

Dated: August 17, 1972.

Charles H. Carr
United States District Judge

Approved as to form:
Littler, Mendelson & Fastiff
By: /s/ George J. Tichy, II
George J. Tichy, II
Attorneys for Employer-Defendants other than T.I.M.E.-DC, Inc.

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Harry J. Keaton
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Brundage, Neyhart, Miller, Ross & Miller
By: /s/ Richard J. Davis, Jr.
Richard J. Davis, Jr.
Attorneys for Union-Defendants

/s/ Don Edgar Burris
Don Edgar Burris
Attorney for Plaintiffs